

Claimant filed an Application for Post Award Medical on February 17, 2004. The nature of medical care sought was stated as "[r]eimbursement to claimant for \$8,500 paid

out-of-pocket for ankle replacement."<sup>1</sup> The ankle replacement surgery had been performed on July 8, 2003. On April 12, 2004, the ALJ entered an order denying claimant's request for payment of medical treatment expenses above that allowed by the Kansas Workers Compensation Schedule of Medical Fees (Fee Schedule). The ALJ held:

The [c]laimant wanted Dr. Buechel to perform ankle replacement surgery; Dr. Buechel is located in New Jersey. The [c]laimant had done some research into ankle replacement procedures and determined there were only two locations in the United States that performed this procedure, neither of which was in Kansas. He asked the [r]espondent to authorize the surgery. The [r]espondent advised it would authorize the surgery, but with the limitation that it would not be responsible for costs above that of the Kansas Fee Schedule, and neither would it be responsible for any travel or lodging expenses. This was repeated in two subsequent letters.

The [c]laimant did not vocalize any disagreement with what was proposed by the [r]espondent. He did not apprise the [r]espondent of his belief that this procedure could not be performed in Kansas. Instead, he underwent the surgical procedure and then asked the [r]espondent to pay the difference between the cost of the surgery and what was allowed by the Kansas Fee Schedule.

The [c]laimant had the option of rejecting the [r]espondent's offer and applying to the Court for authorization of the ankle replacement procedure. Had he done so, the Court may have honored this request, but the Court may have denied the request, especially as no physicians previously had recommended an ankle replacement.

The Court finds this is a matter of contract law. The [r]espondent made an offer and the [c]laimant signified his acceptance of that offer by his actions. Parties should be encouraged to amicably resolve contested issues and they should not lightly be let out of such agreements.

The request for the payment of the surgical procedure above that allowed by the Kansas Fee Schedule is denied.<sup>2</sup>

Claimant contends the ALJ erred in finding that claimant agreed or acquiesced to respondent's offer to pay for the procedure pursuant to the Fee Schedule by its silence and by going ahead with the surgery without first getting authorization from the court. On appeal to the Board, claimant further contends:

[T]hat the ankle replacement surgery, including the prosthesis, was an extraordinary medical procedure required under the circumstances to cure and relieve the effects of claimant's work-related injury. Claimant submits this particular procedure was the

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<sup>1</sup> K-WC E-4 Application for Post Award Medical (filed Feb. 17, 2004).

<sup>2</sup> Award Post Award Medical at 1 and 2 (April 12, 2004).

only procedure available that would eliminate his severe ankle pain and provide claimant with the ankle mobility necessary for claimant to perform his regular work duties enabling him to continue to operate his sign business. Accordingly, this procedure is entitled to a greater fee than is specifically provided by the medical fee schedule.<sup>3</sup>

Conversely, respondent argues that the Fee Schedule applies to this procedure and asks the Board to affirm the ALJ's Award. In addition, respondent argues that claimant's application for post-award medical treatment is out of time because it was filed more than six (6) months after the surgery was performed.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Claimant was injured on December 1, 2000, when he fell from a ladder. His claim was settled by an agreed running award approved by Judge Benedict on September 18, 2002. That Award provided: "Any future medical evaluation or treatment must be approved in advance by the adjuster or upon proper application to the Workers Compensation Director."

It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515 and amendments thereto, as may be reasonably necessary to cure and relieve the employee from the effects of the injury.<sup>4</sup>

Following the entry of the final award, claimant apparently continued to experience problems with his ankle and sought authorization from the insurance carrier for ankle replacement surgery. By letter of February 13, 2003, counsel for respondent notified counsel for claimant that:

[M]y client agrees to authorize the ankle replacement surgery proposed by Dr. Beuchel, with the following limitations.

All medical charges for this procedure will be subject to the Kansas Medical Fee Schedule. In addition, my client will not be responsible for travel, lodging, or per diem. Our position is that, if the claimant chooses to go outside of Kansas for this

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<sup>3</sup> Claimant's Brief in Support of His Application for Review at 2 (filed June 2, 2004).

<sup>4</sup> K.S.A. 44-510h(a).

procedure, he and his medical providers should nevertheless be limited to the benefits payable if the procedure was performed in Kansas.<sup>5</sup>

The conditions imposed by respondent and its insurance carrier were apparently agreed to, or at least not objected to, as on March 5, 2003, there was another letter from Mr. Burkholder to Mr. Cooper:

This is a follow-up to my letter of February 13, 2003.

My client contacted Dr. Buechel's office to advise that he is authorized to perform the ankle replacement surgery on the claimant subject to the Kansas Medical Fee Schedule. My client was advised by the doctor's office that they do not accept any type of workers compensation insurance and instead expected the claimant to pay for the costs related to this surgery "upfront."

Please be advised that, if the claimant does elect to proceed with the surgery and pays the costs in advance, any reimbursement to the claimant for the costs associated with this surgery will be subject to the Kansas Medical Fee Schedule. Also, my client will not be responsible for travel, lodging, or per diem for this out-of-state procedure.<sup>6</sup>

With this understanding, claimant proceeded to schedule the surgery. Before the surgery took place, a third letter was sent by Mr. Burkholder to Mr. Cooper confirming the preconditions of respondent and its insurance carrier's authorization.

My client recently received a telephone call from South Mountain Orthopedics in New Jersey advising that the claimant is scheduled for a total ankle replacement surgery on August 16, 2003, and that he has paid at least some of the surgical costs himself.

This letter is simply to reiterate what I previously stated in my letters of February 13 and March 5, 2003. Regardless of whether it is a medical facility or the claimant seeking reimbursement for expenses related to this surgery, any such reimbursement will be subject to the terms of the Kansas Medical Fee Schedule, and my client will not be responsible for travel, lodging, per diem, or any similar expenses for this out-of-state procedure.<sup>7</sup>

The claimant's medical providers in New Jersey were likewise informed by the insurance carrier of the fact that:

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<sup>5</sup> P.A.H. Trans. at Resp. Ex. A and Cl. Ex. 1.

<sup>6</sup> *Id.* at Cl. Ex. 1 and Resp. Ex. A.

<sup>7</sup> *Id.*

[A]ny medical reimbursement to your facility will be done according to the Kansas State Fee Schedule for Workers Compensation. The amount of reimbursement allowed by the [W]orkers [C]ompensation Fee Schedule will be the only payment made by Utica National Insurance.

Please make arrangements personally with Mr. Thomas as to how the balance of any difference between the Kansas Fee Schedule and surgery costs of New Jersey might be paid.<sup>8</sup>

After the surgery respondent paid to claimant the sum of \$2,922.00, representing the total amount allowed by the Fee Schedule.<sup>9</sup> During oral argument to the Board, claimant conceded that the amount respondent paid was pursuant to the appropriate edition of the Fee Schedule and that if the Fee Schedule applies respondent paid the correct amount. However, claimant argues that the Fee Schedule does not provide for the surgical procedure performed on him. Claimant contends that this is an exceptional case because his ankle replacement surgery was an extraordinary medical procedure or circumstance as contemplated by K.S.A. 44-510i(c)(1).

Respondent counters that the surgery claimant underwent is fully addressed in CPT 27702, "Arthroplasty, ankle; with implant ("total ankle"). As such, respondent contends it has satisfied its financial obligation to claimant for the surgery and the ALJ's Award should be affirmed.<sup>10</sup> The Board agrees, as even the surgeon's bill uses the procedure code number 27702.<sup>11</sup>

This issue presents the type of question that the peer review process was created to address.<sup>12</sup> The parties, however, decided against utilizing that procedure. Claimant also decided against getting prior authorization from the court by filing his Application for Post Award Medical before undergoing the surgery. Instead, claimant proceeded to obtain the treatment knowing that respondent had placed specific limitations on its authorization.<sup>13</sup> K.S.A. 44-510k(b) limits the authority of the ALJ to order payment of medical treatment to

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<sup>8</sup> *Id.*

<sup>9</sup> The insurance carrier determined that the fee schedule would allow \$2,708.20, but it paid claimant this greater amount based upon its internal audit procedures, including a review of the billings conducted by Corvel.

<sup>10</sup> K.S.A. 44-510i(e); K.A.R. 51-9-7.

<sup>11</sup> P.A.H. Trans. at Cl. Ex. 1.

<sup>12</sup> K.S.A. 44-510j; *See Krause v. Frito Lay, Inc.*, No. 255,668, 2000 WL 1523800 (Dec. 16, 2002); *Wright v. Lies Ready Mix & Paving*, No. 237,557, 1999 WL 1113627 (Nov. 18, 1999).

<sup>13</sup> P.A.H. Trans. at 39-42.

six (6) months before the date the application is filed. (The statute obviously contains a typographical error where it uses the word "following"). In this case the surgery was more than six (6) months before claimant filed his Application for Post Award Medical. Therefore, the Board is without authority to order the relief requested.

**WHEREFORE**, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Bryce D. Benedict dated April 12, 2004, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of March 2005.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Jeffrey K. Cooper, Attorney for Claimant  
Vaugh Burkholder, Attorney for Respondent and Utica Mutual Ins. Co. of Texas  
Bryce D. Benedict, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director